Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

SKYE LEONARD, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, REBECCA LEONARD; DONALD LEONARD; REBECCA LEONARD; BRIELLE LEONARD, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, REBECCA LEONARD,
Petitioners,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ESTHER R. SORKIN, ESQ.
Counsel of Record
ALLEN R. BALL, ESQ.
LAW OFFICE OF BALL & YORKE
1001 PARTRIDGE DRIVE, SUITE 330
VENTURA, CA 93000
(805) 642-5177

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Is a clause in a Release and Settlement Agreement limiting arbitration to "any disagreement(s) ... regarding payment of **claims** for medical expense reimbursement under the Policy" so inclusive as to obliterate the distinction between "**coverage**" and "**claims**"?

2. Does a clause in a Release and Settlement Agreement, resolving an insurance bad faith lawsuit, which states that "any disagreement(s) ... regarding payment of **claims** for medical expense reimbursement under the Policy" must be arbitrated provide constitutionally adequate notice that petitioners have waived their constitutional right to a jury trial as to causes of action arising when no medical expense reimbursement **claims** were pending and which causes of action were based on an insurer's cancellation of the policy (**coverage**) and the denial of the peace of mind implied in the **coverage** promised in the Release and Settlement Agreement and/or fraud in the inducement to enter into the Release and Settlement Agreement?

3. Is a clause in a Release and Settlement Agreement limiting arbitration to "any disagreement(s)... regarding payment of **claims** for medical expense reimbursement under the Policy" to be given the same broad construction as would a clause providing for arbitration of "any disagreement(s) ... regarding ..." the Release and Settlement Agreement, such that a cause of action for fraudulently inducing petitioners to sign the Release and Settlement Agreement must be arbitrated under both clauses.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting Review 5

Conclusion 8

Appendix 1a

Appendix A - Ninth Circuit Memorandum - 01/14/02 . . . . . 1a

Appendix B - District Court Order - 08/16/00 . . . . . 5a

TABLE OF AUTHORITIES

Cases

Chloe Z. Fishing Co. v. Odyssey re (London) Ltd.,
109 F.Supp.2d 1236 (S.D., CA, 2000) 7

Johnson v. Mutual Benefit Life Insurance Co.,
847 F.2d 600 (9th Cir., 1988) 5

Navellier v. Sletton, 262 F.3d 923 (9th Cir., 2001) 6

S.A. Mineracao Da Trindade-Samitri v.
Utah International, Inc.
745 F.2d 190 (2nd Cir., 1984) 7

Seaboard Coastline Railroad Co. v. Trailer Train Co.,
690 F.2d 1343 (11th Cir;, 1982) 7

Simula, Inc. v. Autolive, Inc.,
175 F.3d 716 (9th Cir., 1999) 7

Swenson's Ice Cream Co. v. Corsair Corp.,
942 F.2d 1307 (8th Cir., 1991) 7

Constitutional Provisions and Statutes

USCS Const. Amend. V 2

USCS Const. Amend VII 2, 6

9 U.S.C. § 2 2

28 U.S.C. § 1254 1

Petitioners Skye Leonard, a Minor by and through his Guardian Ad Litem, Rebecca Leonard; Donald Leonard; Rebecca Leonard; and Brielle Leonard, a Minor, by and through Her Guardian ad Litem, Rebecca Leonard all respectfully request that a writ of certiorari issue to the review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 14, 2002.

OPINION BELOW

On January 14, 2002, the Court of Appeals for the Ninth Circuit entered its Memorandum reversing the Order of the United States District Court for the Central District of California that denied respondents' motion to compel arbitration.

A copy of this January 14, 2002 Memorandum is attached hereto as Appendix "A"; a copy of the order of the United States District Court for the Central District of California is attached hereto as Appendix "B".

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its Memorandum on January 14, 2002, reversing the Order of the United States District Court for the Central District of California that denied respondents' motion to compel arbitration. Jurisdiction of this court is invoked under Title 28, United States Code section 1254, subdivision (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall ... be deprived of life, liberty, or property without due process of law ..." (USCS Const., Amend V.)

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (USCS Const., Amend VII)

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform in whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
(9 U.S.C. § 2.)

STATEMENT OF CASE

This petition seeks review of an opinion finding that causes of action for fraud in the inducement of a Release and Settlement Agreement, and for bad faith breach of that same agreement are arbitrable under a clause mandating arbitration for "any disagreement(s) ... regarding payment of claims for medical expense reimbursement ... under the Policy ..." (App. "A", p. 3a; App. "B", pp. 5a, 7a to 8a.)

In 1982, Donald and Rebecca Leonard purchased a medical insurance policy issued by respondent Equitable. Subsequently, the Leonards had a son, Skye, born a quadriplegic with cerebral palsy. There have been three lawsuits to secure life sustaining medical care for Skye. The first arose when Equitable denied payments for Skye's speech therapy. The Leonards filed suit in the Superior Court of the State of California, and the case eventually settled. (App. "B", p. 6a.)

Following this settlement, Equitable began denying payment for diapers and wipes prescribed by Skye's physicians due to the incontinence that is a medical consequence of Skye's palsy. This resulted in a second case ("Leonard II), also filed in the Superior Court of California, but later removed to the United States District Court for the Central District of California. (App. "B", p. 6a.)

During the course of this litigation, it became apparent that Equitable had marketed the policy to the insureds, knowing that it would fail and planning to surreptitiously and without knowledge of the insureds, transfer low risk insureds out of the class of insureds defined by the policy, thereby increasing the loss rate and allowing the insurer to price the remaining high risk insureds, such as the minor Skye Leonard, out of coverage. (E.R. 25-26; S.E.R. 18-19.)

In June of 1999, the Leonard II case, also settled, pursuant to an agreement that contained the following critical provisions (App. "B", pp. 6a to 7a.)

> 1. That Equitable would make periodic payments to Donald Leonard, Rebecca Leonard, and Brielle Leonard (daughter of Donald and Rebecca) and pay their attorney's

fees, for a total monetary settlement of approximately 2.9 million dollars.

2. That Donald, Rebecca, and Brielle Leonard would terminate their coverage under the policy; and that Skye would remain as the sole insured.

3. That Skye Leonard would be covered for life without any further payment of premiums; and

4. That "[I]n the event any disagreement(s) should arise between Equitable and Claimants regarding payment of claims for medical expense reimbursement under the Policy, including, but not limited to, disagreements regarding whether claims are covered ... " the disagreement would be resolved by arbitration.

Following this June 1999 settlement, toward the end of July, 1999, Equitable sent Donald Leonard a "premium rate increase notice", and, a "notice of premium due", mandating payment of a premium by September 3, 1999. Under the terms of the June 1999 Settlement, no premiums were due. On October 2, 1999, Equitable sent Donald Leonard a "notice" that the policy "is about or has expired" due to the non-payment of the September 3, 1999 premium that, under the terms of the Settlement Agreement, were the responsibility of respondent Equitable. (App. "B" p. 8a.) In November, 1999, again with no claims made for medical expense reimbursement, Equitable told one of Skye's health care providers that coverage had expired in September of 1999. (App. "B", p. 8a.)

Beginning in December of 1999, the Leonards submitted claims that Equitable denied because "this policy lapsed for non-payment of premiums." On February 7, 2000, Equitable's counsel wrote, stating that the statements that the policy had lapsed were erroneous, and, that Equitable was acting to correct the errors. On February 21, 2000, Equitable again refused to pay claims because Equitable stated that the policy had lapsed. (App. "B", pp. 8a to 9a.)

On March 7, 2000, this action was filed, alleging causes of action for bad faith breach of the Release and Settlement Agreement and for Fraud, as well as for bad faith breach of the insurance policy and for the intentional infliction of emotional distress. . (App. "B", pp. 5a, 10a.) Respondent Equitable moved to compel arbitration, and the district court denied the motion. (App. "B", pp. 5a, 12a to 13a.)

Equitable appealed to the United States Court of Appeals for the Ninth Circuit. In a memorandum opinion, filed January 14, 2002, the Ninth Circuit held that the termination of coverage was nothing more than an implicit denial of all future claims, so that all of the Leonards's causes of action were subject to the arbitration clause.
(App. "A", pp. 1a, 3a.)

REASONS FOR GRANTING REVIEW

As indicated by other decisions of this court, the breadth of arbitration agreements is a matter of critical public concern. The scope of the arbitration agreement in this case also has serious implications for the entire insurance industry. Normally, the existence of insurance coverage is supposed to secure "peace of mind", whether or not claims are ever made. (see *Johnson v. Mutual Benefit Life Insurance Co.*, 847 F.2d 600, 602-603 (9th Cir., 1988) [repeated incorrect billing

statements and termination notices deprived plaintiff of peace of mind, with no mention made if any claims had been made].) It is this "peace of mind" that is a crucial component in nearly all advertising for all insurance.

If, as the Ninth Circuit held here, the denial that insurance coverage exists is nothing more than an implied promise to deny claims, then the premise underlying all insurance advertising is false because the advertised "peace of mind", independent of any claims, simply does not exist. Furthermore, and more important, it raises serious concerns about the notice given by arbitration clauses that the clause is waiving the right to a jury trial about specific causes of action. (see *Navellier v. Sletton*, 262 F.3d 923, 943 (9th Cir., 2001) [adequate notice is mandated by due process].)

Fraud is an action at common law. Here, petitioners sued because respondents fraudulently promised them the "peace of mind" implied by the existence of coverage to induce them to sign the Release and Settlement Agreement. Because "peace of mind" is implied into the existence or non-existence of coverage, but not necessarily into the decision on a particular claim, a clause limiting arbitration to "disagreements ... regarding payment of claims ... under the Policy" would not inform the signatories that this clause waives the Seventh Amendment right to a jury trial as to causes of action for denying the "peace of mind", especially when no claims are pending.

The scope that the Ninth Circuit assigned to the arbitration clause in this case is also of grave public concern because, as shown, it effectively obliterates the distinction between coverage and claims by denying legal protection to the petitioners' interest in peace of mind stemming from coverage, even when no claims are pending. There is also

grave public concern because the Ninth Circuit gave the same broad effect (mandating arbitration of causes of action for fraudulent inducement) to a limited arbitration clause as it would to an extremely broad arbitration clause.

The arbitration clause in this case uses several phrases that, at the time the agreement was reached, indicated a limited scope. It is limited to matters "regarding payment ... under the Policy" instead of, for example, "regarding the Settlement Agreement" (see *Simula, Inc. v. Autolive, Inc.* 175 F.3d 716, 721 (9th Cir., 1999).) It is presumed that parties rely on existing case law in drafting arbitration agreements. (*S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc.* 745 F.2d 190, 194 (2nd Cir., 1984).)

The distinction between the coverage provided under the Release and Settlement Agreement and the claims made under the Policy (App. "B", pp. 6a to 7a) also implicate the long standing problem of arbitrating disputes arising under one contract, based on an arbitration clause in another. Courts throughout the country, have repeatedly struggled with the problems of an arbitration clause in one contract, and, a cause of action arising out of a breach of duty imposed by a separate but related contract. with significantly different results, depending upon the jurisdiction interpreting the contract. (*Seaboard Coastline Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348-1352 (11th Cir;, 1982); *Swenson's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1310 (8th Cir., 1991); *Chloe Z. Fishing Co. v. Odyssey re (London) Ltd.*,109 F.Supp.2d 1236, 1254-1255. (S.D., CA, 2000).) Review should be granted so this issue may be authoritatively resolved, with all courts and counsel in the country aware of the appropriate language to use to insure that disputes in one contract are (or are not) subject to an arbitration clause in a different, but related contract.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this court grant this petition.

Respectfully submitted,

LAW OFFICE OF BALL & YORKE

By: Esther R. Sorkin
Counsel of Record
Attorneys for Petitioners
Skye Leonard, a Minor by and through his Guardian Ad Litem, Rebecca Leonard; Donald Leonard; Rebecca Leonard; Brielle Leonard, a Minor, by and through Her Guardian ad Litem, Rebecca Leonard

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-56542

[Filed January 14, 2002]

SKYE LEONARD, a Minor by and through his Guardian ad Litem, REBECCA LEONARD; DONALD LEONARD; REBECCA LEONARD; BRIELLE LEONARD, a Minor by and through her Guardian ad Litem, REBECCA LEONARD,	)
Plaintiffs-Appellees,	)
v.	)
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-00-02304 AHM
A. Howard Matz, District Judge, Presiding

JUDGES:
Before: O'SCANNLAIN and PAEZ, Circuit Judges, and KING, District Judge.*

MEMORANDUM**

Equitable Life Assurance Society ("Equitable") appeals the denial of its motion to compel arbitration. The facts and prior proceedings are known to the parties; they are not recited herein, except as necessary.

I

Equitable claims that the district court erred in concluding that the Leonards' claims do not fall within the settlement agreement's arbitration provision. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§1-16, "establishes that . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration [when] the problem at hand is . . . construction of the contract['s] language." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). In other words, a controversy falls within a valid arbitration clause "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden*

---

* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Stone, Inc., 734 F.2d 414, 419 (9th Cir. 1984) (internal quotation marks omitted).

The settlement agreement provides for arbitration "[i]n the event any disagreement[s] should arise between Equitable and [the Leonards] regarding payment of claims for medical expense reimbursement under the [health insurance] policy." (second alteration in original). The Leonards' claims fall within this arbitration provision.

The Leonards challenge Equitable's threat to terminate, and then actual termination of the health insurance policy. When Equitable threatened to terminate coverage, it implicitly threatened to deny any future claims under the policy. Similarly, when it terminated the policy, it implicitly denied all future claims. Therefore, "claims for medical expense reimbursement under the policy" are at the heart of the Leonards' suit. Accordingly, the Leonards' claims fall within the arbitration provision.

II

Contrary to the Leonards' suggestion, it is irrelevant that nothing regarding the health insurance policy is in dispute. The arbitration provision is not limited to disputes that involve "the interpretation and performance of the contract itself." *Mediterranean Enters., Inc. v. Ssangyoung Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983). Rather, the provision covers all disputes that "regard[]" claims for reimbursement under the policy. In other words, the provision captures all disputes that have a "significant relationship" to claims for reimbursement under the policy, even though the policy itself is not in dispute. *Simula, Inc. v. Autoliv, Inc.*,

175 F.3d 716, 721 (9th Cir. 1999). As discussed above, the Leonards' claims bear a significant relationship to medical expense reimbursement under the policy.

III

Finally, we reject the Leonards' contention that paragraph fourteen of the settlement agreement allows for litigation of all disputes regarding the agreement itself. Paragraph fourteen merely provides for attorney's fees for litigation regarding the agreement. It does not guarantee a judicial forum for all disputes regarding the agreement. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 00-2304 AHM (JWJx)

[Filed August 16, 2000]

SKYE LEONARD, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)
	)
Defendant.	)
	)

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

This case is before the Court on the motion of defendant The Equitable Life Assurance Society of the United States ("Equitable") to compel arbitration. Plaintiffs allege causes of action for 1) bad faith breach of insurance contract; 2) bad faith breach of settlement agreement; 3) fraud; and 4) intentional infliction of emotional distress. Equitable contends

that plaintiffs must arbitrate these claims pursuant to an arbitration provision in a June 1999 agreement between the parties.

The Court concludes that the arbitration provision does not encompass plaintiffs' claims in this action. Accordingly, the Court denies defendant's motion.

FACTUAL BACKGROUND

I. The Prior Lawsuits and Settlement Agreement

This is the third lawsuit in this insurer-insured relationship. Plaintiffs are the Leonard family - Donald (father), Rebecca (mother), Brielle (daughter) and Skye (son). Skye is a 12-year old quadriplegic with cerebral palsy. All three disputes have arisen out of defendant Equitable's alleged failures to provide proper coverage for his care.

In 1994, the Leonards sued Equitable in state court alleging that it had improperly denied benefits for Skye's speech therapy. That case settled. In 1997, the Leonards sued Equitable alleging, *inter alia*, that Equitable had improperly refused to pay for medically necessary diapers and baby wipes for Skye. Equitable removed the case to this Court (*Leonard v. Equitable*, CV 97-4586 AHM (CWx)). In June 1999, the Leonards and Equitable executed a settlement agreement and release. The settlement agreement provided that:

> 1. Equitable would make periodic payments to the Leonards and pay their attorneys' fees. The total amount of the payments to the

> Leonards and their counsel is approximately $2.9 million.
>
> 2. Donald, Rebecca and Brielle Leonard would terminate their coverage under the Equitable policy.
>
> 3. Skye would remain as the sole insured. Equitable would provide Skye with coverage for life without any further payment of premiums so long as the Leonards take all necessary steps to secure available government benefits for Skye.

The settlement agreement contains an arbitration provision that states:

> In the event any disagreement(s) should arise between Equitable and Claimants regarding payment of claims for medical expense reimbursement under the Policy, including, but not limited to, disagreements regarding whether claims submitted to Equitable are covered claims under the Policy, and whether Claimants have reasonably pursued and exhausted the governmental benefits referred to in Paragraph 7(d) of this Release, the parties will and hereby do agree to, utilize a neutral third party to resolve said disagreement(s).

At issue in this motion is the scope of the provision that

requires arbitration of "disagreements...regarding payment of claims for medical expense reimbursement under the Policy."

II. Events Leading to This Lawsuit

Following the parties' settlement in June 1999, the following events transpired:

- **July 24, 1999** — Equitable sent Donald Leonard a "premium rate increase notice" informing him that a premium increase would take effect in September 1999.

- **July 30, 1999** — Equitable sent Donald a "notice of premium due." This bill requested that a 3-month premium payment of $2,500 be paid by September 3, 1999.

- **October 2, 1999** — Equitable sent Donald a "notice" that the policy "is about to or has expired" due to non-payment of the September 3 premium.

- **November 11, 1999** — A representative from Rehabilitation Design, a business that provides Skye's medical equipment, sent Donald a fax indicating that an Equitable representative "told me Skye's insurance coverage

was expired as of Sept. 1999, according to their computer."

- **January 11, 2000** — Equitable refused to pay a claim submitted by plaintiffs for Skye's medical treatment because "this policy lapsed for non-payment of the premium due September 3, 1999."

- **January 22, 2000** — Equitable refused to pay another claim for the same reason.

- **January 24, 2000** — Counsel for the Leonards sent a letter to counsel for Equitable informing him of Equitable's actions.

- **January 31, 2000** — Equitable sent plaintiffs a claim denial letter identical to the January 22, 2000 letter.

- **February 7, 2000** — Equitable's counsel responded to plaintiffs' counsel's letter. Counsel apologized for Equitable's mistakes and assured plaintiffs that Equitable was taking action to correct its errors.

- **February 21, 2000** — Equitable sent plaintiffs another denial letter.

- **March 7, 2000** Plaintiffs filed this lawsuit.

Equitable admits that its above-described actions were erroneous. It contends that it has fully paid all of plaintiffs' outstanding claims for benefits and that it has implemented special claims handling procedures for plaintiffs. Equitable also states that it has timely made all other payments to the Leonards and their counsel as required by the settlement agreement.

LEGAL STANDARDS

Defendant moves to compel arbitration of plaintiffs' claims under the Federal Arbitration Act ("FAA"). The FAA provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The effect of §2 is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,24,103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983). Section 2 also establishes a "liberal federal policy favoring arbitration," which requires courts to resolve any doubts concerning arbitrability or the scope of arbitrable issues in favor of arbitration, *id.*, and to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158 (1985). However, "[a]rbitration is a matter of contract, and a party cannot be required to submit any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Comm. Workers*, 475 U.S. 643, 648 (1986).

DISCUSSION

The issue here is whether plaintiffs' claims constitute disagreements "regarding payment of claims for medical expense reimbursement under the Policy" and are therefore arbitrable. The sequence of events leading up to this lawsuit is important. On July 24, 1999, Equitable sent plaintiffs a premium rate increase notice. On July 30, Equitable sent plaintiffs a bill for premiums allegedly owed under the Policy. When plaintiffs did not pay that bill, Equitable followed up with a second notice on October 2 informing plaintiffs that the Policy "is about to or has expired."

None of these actions was in response to any claim of any plaintiff for benefits. Indeed, plaintiffs had not made any claims for benefits following execution of the settlement agreement as of the point when Equitable demanded a premium payment and threatened to cancel the Policy. Thus, plaintiffs' claims do not fall with in the scope of the arbitration clause "regarding payment for claims of medical expense reimbursement." It is certainly true that defendant's improper cancellation of the policy ultimately resulted in Equitable's refusal to pay claims under the Policy. But that does not change the fact that plaintiffs' claims arose out of Equitable's allegedly tortious demands for premium payments and its cancellation of the policy when plaintiffs did not pay the improperly-demanded premiums.

Both in the moving papers and at the July 17, 2000 hearing on this motion, defense counsel argued that plaintiffs should be compelled to arbitrate based on the Ninth Circuit's decision in *Simula v. Autoliv*, 175 F. 3d 716 (9th Cir. 1999). *Simula* involved a license agreement for an automobile air bag

system executed by American and German business entities. The licensor later filed suit alleging, *inter alia*, claims for antitrust and trademark violations and trade secret misappropriation. The defendant moved to compel arbitration pursuant to a provision in the license agreement that required the parties to arbitrate all disputes "arising in connection with" the agreement. The Ninth Circuit held that the arbitration agreement encompassed "every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract" and found that the plaintiff's claims were arbitrable. *Id.* at 721.

Simula is distinguishable from the instant case in at least two important respects. First, the arbitration clause here is narrowly tailored. It includes only disputes "regarding payment of claims for medical expense reimbursement under the Policy," not, for example, all disputes regarding whether the Policy remained in effect or disputes arising in connection with the settlement agreement generally. Thus, this arbitration provision is narrower than the provision in *Simula,* which required arbitration of *all* disputes arising in connection with the parties' agreement. Moreover, *Simula* involved a contract between foreign entities and the Court of Appeals noted that the federal policy favoring arbitration "applies with special force in the field of international commerce." *Id.* at 726.

In sum, the Court concludes that plaintiffs' claims cannot fairly be characterized as disagreements "regarding payment of claims for medical expense reimbursement under the Policy."

CONCLUSION

For the foregoing reasons, and good cause appearing therefor, the Court DENIES defendant's motion.

IT IS SO ORDERED.

/s/ _____
A. Howard Matz
United States District Judge

DATE: August 16, 2000

Supreme Court, U.S.
FILED
MAY 15 2002
OFFICE

No. 01-1533

IN THE

Supreme Court of the United States

SKYE LEONARD, a Minor by and through his Guardian ad Litem, Rebecca Leonard; DONALD LEONARD; REBECCA LEONARD; and BRIELLE LEONARD, a Minor by and through her Guardian ad Litem, Rebecca Leonard,

Petitioners,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ROYAL F. OAKES
ANDREW S. WILLIAMS
BARGER & WOLEN LLP
515 South Flower Street
34th Floor
Los Angeles, CA 90071-2200
(213) 680-2200

RONALD L. OLSON
CHARLES D. SIEGAL
TED DANE*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
(213) 683-9100

Attorneys for Respondent

* *Counsel of Record*

May 15, 2002

174026

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The only question presented by the decision of the court of appeals from which certiorari is sought is:

Whether the court of appeals, applying this Court's settled rules for interpreting arbitration clauses, correctly held that an arbitration clause covering "any disagreement(s) . . . regarding payment of claims" under an insurance policy required arbitration of a dispute concerning the insurer's temporary failure to pay claims because of an erroneous indication that the policy had lapsed?

STATEMENT PURSUANT TO RULE 29.6

Respondent The Equitable Life Assurance Society of the United States ("Equitable") states that its parent companies are AXA and AXA Financial, Inc. and that no publicly held company, other than AXA, owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Counterstatement of the Case	1
A. Introduction	1
B. The Policy and Release	2
C. The Arbitration Clause	3
D. The Claims in This Lawsuit	4
E. The Decision by the Ninth Circuit	5
Reasons for Denying the Writ	6
A. The Court of Appeals Correctly Applied this Court's Settled Rules for Determining the Scope of an Arbitration Clause	6
1. Petitioners and Equitable Agreed to a Broad Arbitration Clause	8
2. The Claims in Petitioners' Lawsuit Fall Well Within the Scope of the Arbitration Clause	9

Contents

Page

B. The Decision by the Court of Appeals Does Not Conflict With The Decisions of Any Other Circuit or this Court 11

C. The Decision by the Court of Appeals Does Not Raise Any Serious Issue of Federal Law 12

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 12

Chiron Corp. v. Ortho Diagnostic Sys., Inc., No. C 98-0639 SI, 1998 U.S. Dist. LEXIS 19364 (N.D. Cal. Dec. 4, 1998), *aff'd*, 207 F.3d 1126 (9th Cir. 2000) 8

Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236 (S.D. Cal. 2000) 8, 11, 13

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 9

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 7, 11

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 7, 11

North River Ins. Co. v. Allstate Ins. Co., 866 F. Supp. 123 (S.D.N.Y. 1994) 8

Quackenbush v. Allstate Ins. Co., 121 F.3d 1372 (9th Cir. 1997) 8

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 4

Cited Authorities

Page

Seaboard Coastline Railroad Co. v. Trailer Train Co., 690 F.2d 1343 (11th Cir. 1982) 11

Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999) 8

Swenson's Ice Cream Co. v. Corsair Corp., 942 F.2d 1307 (8th Cir. 1991) 11

Rules:

Ninth Circuit Rule 36-3 6

United States Supreme Court Rule 10 ..... 6, 7

Other Authority:

Webster's New Twentieth Century Dictionary 1520 (2d ed. 1979) 8

COUNTERSTATEMENT OF THE CASE

A. Introduction

This petition for certiorari involves a garden-variety contract issue concerning the application of an arbitration clause to the specific facts of a dispute between petitioners and respondents.

Due to an error indicating that petitioners' health insurance policy lapsed, Equitable temporarily failed to pay claims under the policy. Although an arbitration clause that was part of an earlier settlement agreement between the parties required arbitration of "any disagreement(s) . . . regarding payment of claims for medical expense reimbursement under the policy," petitioners filed a federal district court suit, in which each count was predicated on Equitable's failure or refusal to pay claims. The Ninth Circuit reversed the district court's denial of a motion to compel arbitration of this dispute, holding that "'claims for medical expense reimbursement' are at the heart of [petitioners'] suit" and "[a]ccordingly, [petitioners'] claims fall within the arbitration provision."

The Ninth Circuit correctly decided this case, on its own particular facts, applying this Court's settled rule that arbitration clauses should be liberally construed, and that any doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration. The decision creates no conflict with any decision by another court of appeals or any decision of this Court. The decision raises no question of any significance to anyone but the parties to this case. Indeed, the Ninth Circuit's decision is unpublished and

accordingly creates no precedent for any other case. In short, there is nothing about the decision that warrants review by this Court.

B. The Policy and Release

In 1982, petitioner Donald Leonard purchased a medical insurance policy (the "Policy") from respondent Equitable. (Pet. 3.)[1] Since then, Equitable has paid approximately $200,000 in benefits under the Policy, mostly in relation to the tragic condition of Leonard's son, petitioner Skye Leonard, who is a quadriplegic with cerebral palsy. (ER 111, 115.) At times, Equitable has denied claims under the Policy. When this has happened, petitioners have sued Equitable, alleging bad faith and seeking compensatory and punitive damages. Petitioners have brought three such lawsuits, including this one. The first lawsuit was settled in 1994. The second lawsuit was settled under the terms of a Release and Settlement Agreement (the "Release") in July of 1999. The Release provided for payments to petitioners totaling millions of dollars, together with lifetime coverage under the Policy for Skye Leonard, without requiring any payment of premiums. In exchange, petitioners released all claims against Equitable and agreed to the arbitration clause that is the subject of the petition. (ER 112-13.)

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1. References to "Pet. __" are to petitioners' Petition for Writ of Certiorari. References to "ER __" are to Appellant's Excerpts of Record filed with the Ninth Circuit.

C. The Arbitration Clause

The Release contains a broad arbitration clause which requires arbitration of "any" disputes "regarding" the payment of claims under the Policy. The arbitration clause, Paragraph 9 of the Release, reads as follows:

> In the event *any disagreement(s)* should arise between EQUITABLE and CLAIMANTS *regarding payment of claims for medical expense reimbursement under the POLICY*, including, *but not limited to*, disagreements regarding whether claims submitted to EQUITABLE are covered claims under the POLICY, and whether CLAIMANTS have reasonably pursued and exhausted the governmental benefits referred to in Paragraph 7 (d) of this RELEASE, the parties will, and hereby do agree to, utilize a neutral third party ("Neutral") to resolve said disagreement(s). The Neutral's decisions regarding such disagreements shall be final and binding on EQUITABLE and CLAIMANTS, and neither EQUITABLE nor CLAIMANTS may challenge the Neutral's decision by means of appeal or litigation or otherwise. . . . The Neutral shall have the power to award sanctions to either party not to exceed fifteen thousand dollars ($15,000) per disagreement. However, the Neutral shall have no power to award attorney fees.

(ER 75, emphasis added.)

The arbitration clause was important to Equitable. Having already spent years litigating with petitioners in court, Equitable insisted on a procedure for resolving any future

disagreements regarding the payment of claims that would materially reduce the costs and incentives for protracted and unnecessary litigation. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974) (arbitration "avoid[s] the costliness and delays of litigation").

D. The Claims in This Lawsuit

Petitioners' claims in this lawsuit arise out of an unfortunate mistake that resulted in the temporary denial of payments to Skye Leonard under the Policy. As noted above, Equitable agreed under the Release to provide lifetime coverage to Skye Leonard and to waive payment of any premiums. Due to miscommunications, the waiver of premiums was not properly recorded in Equitable's computers. As a result, petitioners were notified that the Policy had lapsed for failure to pay premiums. When petitioners submitted claims for medical expenses under the Policy, those claims were initially denied. (ER 105-08.)

Equitable has since fully acknowledged this mistake, paid all the claims that had mistakenly been denied, apologized for the mistake, and instituted new claims procedures that will ensure the mistake does not happen again. (ER 113-14.)

Nevertheless, petitioners filed their amended complaint, on March 15, 2000. (ER 21.) In that complaint, petitioners expressly allege that the factual basis of each claim is the (mistaken) denial by Equitable of Skye Leonard's claims for medical reimbursement. For example, petitioners allege:

- For their first cause of action, that "Equitable . . . failed to honor [its] obligation to pay Plaintiffs for the necessary medical treatment incurred by Skye" (ER 30, ¶ 38; *see id.* 29-30, 32, ¶¶ 30, 35, 37-38, 47);

- For their second cause of action, that Equitable "breached the terms of the [Release] by denying payment on Skye's medical bills" (ER 34-36, ¶¶ 55, 57, 63);

- For their third cause of action, that "Equitable has failed, and continues to fail, to pay Plaintiffs' claims for medically necessary expenses and supplies" (ER 38, ¶ 75; *see id.* ¶ 73); and

- For their fourth cause of action, that Equitable's "malicious administrative indifference in the continued denial of coverage and rejection of the requests for payment has and continues to force great emotional hardship on each of the Plaintiffs." (ER 39, ¶ 78; *see id.* 40, ¶¶ 82-83.)

E. The Decision by the Ninth Circuit

Equitable moved to compel arbitration under the arbitration clause and to stay the district court litigation. Disregarding the allegations in the amended complaint specifically predicating petitioners' claims on Equitable's failure to pay claims for medical treatment, and narrowly construing the arbitration clause, the district court denied the motion. The Ninth Circuit reversed. After reviewing the specific facts of this case, the Ninth Circuit determined that

the arbitration clause in the Release covered petitioners' claims because "'claims for medical expense reimbursement under the policy' are at the heart of [petitioners'] suit." (Pet. 2a.) The decision is unpublished, and under Ninth Circuit rules thus may not be cited to or by the courts. *See* Ninth Circuit Rule 36-3.

This petition for certiorari followed.

REASONS FOR DENYING THE WRIT

There is nothing about this case that warrants review by this Court. The Ninth Circuit applied this Court's settled principles favoring arbitration in construing the arbitration clause and applying it to the facts of the parties' dispute. The case raises no conflict with any other circuit or any decision of this Court, raises no important federal question, and has no significance except to the parties to this case. At most, petitioners disagree with the court of appeals' interpretation of the specific arbitration clause involved here and the court's application of that clause to the specific facts of this dispute. The Supreme Court, however, is not a forum to resolve quibbles over routine contract disputes. *See* Rule 10, Supreme Court Rules ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The writ should be denied.

A. The Court of Appeals Correctly Applied this Court's Settled Rules for Determining the Scope of an Arbitration Clause

The decision by the Ninth Circuit does not break any new ground. This Court has instructed that "questions of arbitrability must be addressed with a healthy regard for the

federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

> The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25; *accord Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995). Agreements to arbitrate "are 'generously construed.'" *Mastrobuono*, 514 U.S. at 61 n.7 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

The Ninth Circuit applied the *Moses H. Cone* standard for determining the scope of an arbitration clause. *See* Memorandum, Pet. 2a, 4a (quoting from and relying on *Moses H. Cone*). Petitioners do not contend that the Ninth Circuit stated an improper rule of law regarding the scope of an arbitration clause. Although petitioners disagree with the Ninth Circuit's application of that rule of law to the specific facts of this case, that is not a ground for review by the Supreme Court. *See* Rule 10, Supreme Court Rules.

In any event, the Ninth Circuit correctly applied the *Moses H. Cone* standard in finding that the dispute was arbitrable, as we show below.

1. Petitioners and Equitable Agreed to a Broad Arbitration Clause

As shown above, the arbitration clause in the Release includes "*any* disagreement(s) . . . regarding payment of claims for medical expense reimbursement under the POLICY, including, *but not limited to*, disagreements regarding whether claims submitted to EQUITABLE are covered claims under the POLICY, and whether CLAIMANTS have reasonably pursued and exhausted the government benefits referred to in Paragraph 7(d) of this RELEASE . . . ."

By using this broad language — "any" disagreement "regarding" payment of claims — the parties intended the range of disputes covered by the arbitration clause to be expansive. "The use of the term 'any' makes it clear that the parties intended the [arbitration] clause to be broad." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, No. C 98-0639 SI, 1998 U.S. Dist. LEXIS 19364, *15 (N.D. Cal. Dec. 4, 1998), *aff'd*, 207 F.3d 1126 (9th Cir. 2000); *accord North River Ins. Co. v. Allstate Ins. Co.*, 866 F. Supp. 123, 127 (S.D.N.Y. 1994). Moreover, terms like "regarding," such as "with reference to," "in connection with," and "relating to" should be read expansively. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999); *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1380 (9th Cir. 1997) (recognizing as "broad in scope" clause requiring arbitration of any dispute "with reference to" the contract); Webster's New Twentieth Century Dictionary 1520 (2d ed. 1979) (defining "regarding" as "respecting," "concerning," or "relating to"); *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1254-55 (S.D. Cal. 2000) (clause requiring arbitration of disputes "concerning any claim under

the [insurance] Policy" was broad in scope and covered "non-contractual claims which implicate the [insurance company's] duties under the . . . policies themselves"); *see also Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 193-94 (1991) (clause requiring arbitration of disputes "regarding" contract is "a broad arbitration provision").

The use of examples of disagreements subject to arbitration prefaced by the phrase "including but not limited to" further shows that the petitioners and Equitable intended a broad reading of the clause. By choosing the "not limited to" language, petitioners and Equitable expressed their intention that the arbitration clause cover *any* dispute regarding the payment of claims — however and for whatever reason that dispute arose regarding the payment of claims.

2. The Claims in Petitioners' Lawsuit Fall Well Within the Scope of the Arbitration Clause

As shown above, petitioners expressly allege in their amended complaint that the basis of each claim is the (mistaken) denial by Equitable of Skye Leonard's claims for medical reimbursement. The Ninth Circuit, therefore, correctly recognized that "claims for medical expense reimbursement under the policy are at the heart of [petitioners'] suit." (Pet. 3a.)

Petitioners contend in their petition, as they did in the Ninth Circuit, that the arbitration clause is not applicable to their lawsuit because Equitable has denied that insurance coverage under the Policy "exists." (ER 28, ¶ 27; *see* Pet. 6.) Petitioners try to draw a distinction between claims that were denied for one reason (such as because a certain procedure was not covered) and claims that were

denied for some other reason (such as because the Policy had lapsed). If nothing else, the "including but not limited to" language quoted above makes clear that the parties did not intend to classify disputes regarding the payment of claims in this manner. Under the arbitration clause, *any* dispute regarding the "payment of claims" must be arbitrated, without limitation to what the dispute regarding claims is about or how that dispute arose. Adoption of the distinction asserted by petitioners would limit the arbitration clause to the first of the two examples of disputes included with the clause, rendering the second example a nullity and conflicting with the express direction that the clause is "not limited to" either of the examples, but applies more broadly to "any" disagreements "regarding" the payment of claims.

The Ninth Circuit correctly concluded that termination of an insurance policy (or to use petitioners' words, a denial that coverage "exists" under the policy) is implicitly or effectively a denial of future claims under the policy and that accordingly, even under petitioners' argument, the dispute is about "claims for medical reimbursement under the policy." (Pet. 3a.) Here, there is a strong connection between the denial of coverage under the policy and the denial of claims, because Equitable actually *did* deny claims submitted for medical expenses under the Policy, and it was that denial or refusal to pay claims which prompted this lawsuit. (ER 28, ¶ 25; *id.* 113-14.) No matter how hard petitioners try to transform the allegations in their lawsuit, the fact remains that claims for medical expenses under the policy "are at the heart" of the lawsuit.

In any event, even if petitioners could raise a doubt about whether the arbitration clause covers the dispute described

in their lawsuit, all such doubts had to be resolved in favor of arbitration. *See Mastrobuono*, 514 U.S. at 62; *Moses H. Cone*, 460 U.S. at 24-25.

B. The Decision by the Court of Appeals Does Not Conflict With The Decisions of Any Other Circuit or this Court

The decision by the Ninth Circuit raises no conflict with the decision of any other circuit court of appeal. Petitioners suggest that different jurisdictions have reached "significantly different results" concerning whether a given dispute was arbitrable. (Pet. 7.) But the only reason the courts may have reached "different results" in these cases was because the cases involved differences in the terms of the arbitration clause and the specific facts concerning the dispute to which the clause was claimed to apply. The cases applied the same settled rule of law (the liberal *Moses H. Cone* standard) to the specific facts of the dispute presented to them. *See Seaboard Coastline Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348 (11th Cir. 1982) ("we construe arbitration clauses generously, resolving all doubts in favor of arbitration"); *Chloe Z Fishing*, 109 F. Supp. 2d at 1241 (citing *Moses H. Cone*). Although *Swenson's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307 (8th Cir. 1991), did not contain any discussion of the standard for arbitration, the court made the uncontroversial determination that a dispute arising from a distribution contract which "contains no language requiring arbitration" was not arbitrable. *See id.* at 1308.

C. The Decision by the Court of Appeals Does Not Raise Any Serious Issue of Federal Law

The decision by the Ninth Circuit does not raise any serious issue of constitutional or federal law. As shown above, the rule governing the scope of an arbitration clause is well settled and the Ninth Circuit applied that settled rule.

Petitioners contend that the decision by the Ninth Circuit raises a constitutional question concerning whether the arbitration clause gave them adequate notice that they were waiving their right to a jury trial. (Pet. 6.) Petitioners did not raise this argument, or any similar argument, in the court of appeals. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 146 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). The argument is frivolous. Petitioners were aware of the scope of the arbitration clause in the Release when they signed it. The rule requiring arbitration clauses to be liberally construed was settled long before petitioners agreed to the arbitration clause, and as petitioners point out the parties are presumed to rely on existing law when drafting arbitration agreements. (Pet. 7.) Petitioners do not claim that they were unaware of the arbitration clause in the Release or that Equitable misled them with regard to the arbitration clause or its scope. Although petitioners contend that Equitable fraudulently induced them to sign the Release and Settlement Agreement by allegedly intending not to perform under that contract, that claim of "fraud" does not go specifically to the arbitration clause, and this Court has long held that claims for fraud in the inducement of the contract are arbitrable. *See Moses H. Cone*, 460 U.S. at 24-25 (citing *Prima Paint Corp. v. Flood*

& Conklin Mfg. Corp., 388 U.S. 395 (1967)); *accord Chloe Z Fishing*, 109 F. Supp.2d at 1254-55 (clause requiring arbitration of disputes "concerning any claim under the [insurance] Policy" covered tort claims).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

ROYAL F. OAKES
ANDREW S. WILLIAMS
BARGER & WOLEN LLP
515 South Flower Street
34th Floor
Los Angeles, CA 90071-2200
(213) 680-2200

RONALD L. OLSON
CHARLES D. SIEGAL
TED DANE*
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
(213) 683-9100

Attorneys for Respondent

* *Counsel of Record*